IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-82

UNITED STATES OF AMERICA,
Appellant,
vs.
TOPCO ASSOCIATES, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR TOPCO ASSOCIATES, INC.

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QUESTION PRESENTED.

The questions found in the government's brief do not accurately state the issue for review; they are not "expressed in the terms and circumstances of the case." U. S. SUP. CT. R. 40.1(d)(1). More correctly stated the question presented is:

> Whether it is illegal per se under Section 1 of the Sherman Act for a grocery procurement cooperative to license trademarks in specified areas for the purpose of providing private labels for each member and with the effect of promoting competition.

On this appeal the government seeks to expand the limited categories of business arrangements held to be per se violations of the Sherman Act. While the question presented is a narrow one, the answer will have an important impact in the food distribution industry and could affect the ability of many small businesses in other industries as well to compete with their larger, integrated rivals.

STATEMENT.

This is a direct appeal from a judgment of the district court dismissing the government's complaint against Topco Associates, Inc. (hereinafter "Topco"), a cooperative grocery buying organization. The complaint alleged that Topco engaged in a combination and conspiracy with its members to sell Topco-branded products only within licensed marketing territories. The government contended this was a per se violation of Section 1 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 1).

The district court found that the Topco licensing practices do not control or affect prices or otherwise inhibit competition and are not unlawful per se (F. 45, 46, A. 564-565; C. 4, A. 567).[1] After a full trial on the merits Judge Will determined that the government had "failed to establish a violation of Section 1 of the Sherman Act" (C. 5, A. 567). The evidence established that the purpose and

1. "A" refers to Appendix; "F" refers to the district court's Findings of Fact; "C" refers to the district court's Conclusions of Law; "R" refers to record filed, but not included in the appendix; "Tr" refers to the trial transcript; and "GB" refers to the Government's Brief. All government exhibits ("GX") were offered and received in evidence at Tr. 19 and 24, except GX 116-132 which were received at Tr. 1015-1016. All defendant's exhibits ("DX") were offered and received in evidence at Tr. 27 and 28, except DX 31, offered and received at Tr. 252 and DX 1-5 offered and received at Tr. 14.

effect of these practices is to enable Topco members to compete effectively with the larger supermarket chains to the ultimate benefit of the consumer (Opinion, A. 552-553). Therefore, Judge Will concluded (C. 4, A. 567):

> The Topco licensing provisions are not inherently unreasonable and have no substantial adverse effect on competition in the relevant market. They are ancillary and subordinate to the fulfillment of the legitimate, pro-competitive purpose of the Topco cooperative, reasonable and in the public interest.

These conclusions are based upon extensive and detailed findings of fact derived from a thorough inquiry into the market positions of Topco members and the purpose, necessity and competitive impact of the practices in issue.

A. Private Label in the Food Industry.

Food is the nation's largest industry; it is also an increasingly concentrated one (DX 1, A. 459-460). Led by The Great Atlantic and Pacific Tea Co., which had 15,000 stores by 1930, the industry has been transformed from one characterized by small family businesses to one of large concentrated commercial enterprises. Many independent grocers have disappeared, and the total number of grocery stores declined from a peak of 386,897 in 1939 to 244,838 in 1963. (F. 22, A. 559; DX 1, A. 461, 468-472; Applebaum, A. 161.) The largest chains continue to dominate food retailing and set the competitive pace. Thus, in 1967 the twenty-five largest chains represented 85.6% of total food chain sales. (F. 19, A. 558; Pretrial Stipulation, A. 14, 17.) *See United States* v. *Von's Grocery Co.*, 384 U. S. 270, 277 (1966).

Because of their size and economic resources the leading regional and national chains have through the years achieved very significant advantages over the smaller

operators both in purchasing and distribution functions (Barnes, A. 344-345).[2] As the district court found, perhaps the most competitively significant innovation made possible by their size was the private label (F. 23, A. 560; DX 1, A. 484-488).[3]

1. Origin and Development of Private Label.

A & P, Kroger, Safeway and National Tea were pioneers in the development of private label merchandise in the food industry. These chains arranged for their own sources of supply and frequently themselves engaged in manufacturing. They introduced a group of high quality products bearing their own labels and sold exclusively in their stores. (F. 23, A. 560; DX 21, A. 528-529; DX 1, A. 487; Apple-

2. Purchasing advantages achieved as a result of their economic strength include: (1) the ability to demand the best products at the lowest prices; (2) establishment of national purchasing organizations, testing laboratories and quality control programs; and (3) the capacity to integrate backward by acquiring or establishing manufacturing and processing plants and thereby controlling costs and sources of supply and deriving a profit both at the manufacturing and retail level. Marketing advantages of the large chains include: (1) preferred access to the most desirable locations, particularly in new shopping centers; (2) financial resources to expand into a new geographic area with enough stores to support a warehouse and full page ads in large daily newspapers; (3) economic strength to experiment with loss leader and traffic building promotions; and (4) the financial capacity to "buy" a market share in a new area by operating at a loss while making up that loss through profits from other areas where their positions are well established. (F. 20, A. 558-559; Applebaum, A. 159-160; DX 1, A. 464.)

3. Private label merchandise in the food industry consists of products sold under a trademark or brand owned by a distributor (wholesaler or retailer). The distributor rather than the manufacturer generally takes responsibility for (1) establishing product specifications; (2) establishing a source of supply; (3) quality standards and controls; (4) packaging and label design and procurement; (5) physical movement from production to the distribution warehouse; (6) pricing and promotion; and (7) success of the product. (Finding 24, A. 560-561; DX 1, A. 485; Applebaum, A. 162.)

baum, A. 167.) Through use of private label products significant cost economies were achieved in purchasing, transportation, warehousing, promotion and advertising. As the consumer soon recognized, these economies resulted in lower prices on products of quality comparable to national brands. (F. 24, 25, A. 560-561; Applebaum, A. 164-165; DX 1, A. 487.) All of the national and regional chains of sufficient size to do so adopted their own private label programs, thereby attracting a greater volume of trade and building consumer loyalty while at the same time increasing profits. These advantages were compounded when a new item was introduced under an established private label, because there was a ready consumer acceptance based upon confidence in other items under the same brand. (F. 24, 25, A. 560-561; DX 2, A. 501-502; Fenn, A. 53-58; Applebaum, A. 163, 165-166; Davis, A. 258, 259.)

Private label procurement and many other advantages of the giant chains were beyond the reach of smaller operators. As a result of their inability to meet the price and product competition of the large chains, independent grocery retailers lost much of their business. Many did not survive; others survived only by duplicating in some measure the advantages and economies of scale which had been achieved by their larger rivals. During the 1930's and 40's many independents joined in food buying cooperatives and other affiliated groups. Among the cooperatives was Topco's predecessor, Food Cooperatives, Inc., founded in 1944 by a small group of local chains scattered about the country. (F. 1, 8, A. 554, 555-556; GX 1, A. 367; Fenn, A. 34-35; DX 1, A. 461, 486.)[4]

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4. During this period various types of organizations were formed. For example, "wholesaler-sponsored voluntary retail groups" consisted of wholesalers supplying products and services to small retailers designed to duplicate not only the economies, but also the consumer impact of the largest chains. Characteristic of the retail members of such groups were common appearance of

Through affiliation the smaller independent grocers were able to approach the efficiency if not the economic strength of the largest chains and thereby to introduce a significant countervailing competitive factor into the economy. The affiliated groups have now grown to represent 44% of national grocery store sales. (F. 34, A. 562; DX 1, A. 464-465; Applebaum, A. 161; Barnes, A. 335-336.)

2. Competitive Significance of Private Label.

Competitive rivalry among supermarkets is essentially an effort to distinguish one store from another and to build consumer loyalty. The consumer is interested in "one-stop shopping" and is generally unwilling to shop at many stores for a large number of relatively low cost items. She selects the market which offers the best "package" of products and services.[5] Yet, the increased mobility of the consumer permits relatively easy switching of loyalty from one store to another. Elements important to the consumer in selecting a regular market include low prices, high quality, cleanliness, variety, prompt check-out and carry-out services, air-conditioning, parking facilities and many other services and conveniences. All of these elements can be duplicated by competitors and most of them in the long

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stores, use of a single name or identification, uniform labels, similar product lines, identical promotions and joint advertising activities. "Retailer-owned cooperative food wholesalers" were another response of retailers to better compete with their larger rivals. These organizations obtained private label merchandise and purchasing economies by combining purchasing power. (DX 1, A. 464-465; DX 3, A. 505-511.)

5. Thus, the nature of competition in the food industry differs greatly from that in many other industries, particularly durable goods, in which unit prices and margins tend to be considerably higher than in foods, and price competition on specific items, indeed specific brands, is extremely important (Applebaum, A. 161-162). *See United States* v. *General Motors Corp.*, 384 U. S. 127, 130-31 (1966).

run tend to increase the cost of food distribution. The private label of the food chain is perhaps the only element of supermarket competition which cannot be precisely copied by competitors and which at the same time produces lower cost for the retailer and assures quality at lower prices for the consumer. (F. 28, A. 561; Fenn, A. 55-56; Newman, A. 278; Barnes, A. 342, 349-350; DX 1, 484-485.)[6]

Once the consumer has gained confidence in the private label of the store as a means of obtaining quality products at lower prices, a measure of consumer loyalty is established because the store and the line of private labels available there are equated. Private labels by definition are exclusive to the respective chain; the consumer knows, for example, that she can obtain "Ann Page" brands only at A & P stores. (F. 24(g), (h), 28, 29, A. 561-562; Opinion, A. 547; Fenn, A. 57, 62; Applebaum, A. 170; Loeb, A. 317.)

In recent years the food distribution industry has become more vigorously competitive. Many marketing areas are literally saturated with supermarkets vying for the consumer dollar. Profit margins in the industry are narrow and rivalry as to price, quality and service is keen. (F. 21, A. 559; DX 1, A. 466, 471, 474; Applebaum, A. 161.) Food discounting has become commonplace, and essential to it has been private label merchandise. The National Commission on Food Marketing found that on the average private label products were priced 20% below advertised brands of comparable quality. (DX 1, A. 466, 495; Applebaum, A. 169-170; Cooke, A. 236-237.)

Without private label products a retailer is at a distinct competitive disadvantage. He generally is unable to offer

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6. Other types of smaller food retailers generally do not attempt to offer private label competition with supermarkets. For example, one of the larger classes of small food retailers is the convenience store which features convenient locations, quick service, and long store hours, but also generally higher prices (DX 1, A. 466-467).

anything unique and may be whipsawed by his competitors who have private label programs in that he is forced to meet their price reductions on national brands, but may be unable to realize an overall margin without private brands. (Applebaum, A. 163-164, 172-173; Meijer, A. 293-294; Barnes, A. 349.) Thus a private label program is of crucial competitive importance. As Judge Will observed in his opinion, "[v]irtually all of the national supermarket chains have extensive private label programs which are now an almost essential element in supermarket competition" (Opinion, A. 546-547).

3. Economics of Private Label.

It is estimated that in 1946 the average grocery store carried approximately 3,000 items. By 1957 the average was 5,144 and by 1963 it had reached 6,800. (DX 1, A. 463.) Today that figure is surely well over 7,000. A reasonably comprehensive private label program must cover many hundreds of items and reflect two or even three quality lines. The big three of the industry, A & P, Kroger and Safeway, all have over 1,000 items in their private label lines. (F. 31, A. 562; Fenn, A. 58; Applebaum, A. 164-165.)

However, such a program requires substantial sales volumes in each product category to support costs of development and procurement. Costly, yet necessary aspects of a successful private label program include establishing quality specifications and standards, testing and quality control, label design and modernization, label printing and maintenance of label inventories at the plants of hundreds of suppliers, establishing a purchasing network to locate and negotiate with sources of supply, and distribution.[7] These cost elements are compounded by the need to

7. Some important product categories, such as frozen foods, aluminum foil, canned green beans, soups, and soft drinks, are virtually impossible to obtain without extremely large volumes (Loeb, A. 307-308, Tr. 837, 859-860; DX 1, A. 485; Davis, A. 252-254).

constantly add or delete items resulting from product innovations, shifting consumer demands and competitive pressures. (F. 32, A. 562; Fenn, A. 58.)

In addition to these substantial costs, the retailer must invest very significant amounts of time and money in advertising and promotion in order to establish consumer recognition and acceptance of his private label line in his marketing area (Applebaum, A. 168; Loeb, A. 306-308; Meijer, A. 295; DX 1, 463-464, 485-488).[8] Even apart from the promotion and advertising expenditures required for effective merchandising, a private label program with the number of items, quality control and volumes necessary to compete effectively with the national chains would require annual sales of $250 million or more. In fact, optimum efficiency would probably require twice that amount. (F. 33, A. 562; Applebaum, A. 166; Cooke, A. 231-232; Davis, A. 255; Meijer, A. 300; Loeb, A. 308; DX 1, 496.) In 1967 Topco member supermarket sales volumes ranged from $1.6 million to $182.8 million, and 18 of its 26 members were well under $100 million (F. 11, A. 556; Pretrial Stipulation, A. 23). The only method by which such chains can achieve economically viable private label competition with larger chains is to become affiliated with buying organizations such as Topco (F. 34, 55, A. 562, 566; Applebaum, A. 166-167; DX 1, A. 486).

B. Formation and Operation of Topco.

1. Founding and Development of Topco.

Topco was founded by a small group of local grocery chains compelled by competitive necessity to attempt development of their own private label programs. The founders

8. National brands on the other hand have ready consumer acceptance and strong loyalty due to preselling of the products by the manufacturer through extensive national and regional advertising (Applebaum, A. 171; DX 1, A. 488).

of Topco could not independently develop private label programs, and the cooperative thus became the vehicle for these chains to procure private label products reasonably competitive with their larger rivals. (F. 8, 55, A. 555, 566; Cooke, A. 229-232; Davis, A. 252-254; GX 1, A. 367; DX 19, A. 524; DX 20, A. 525; DX 21, A. 526.) Topco began with a line of canned goods, dairy and other grocery products and in 1950 added frozen foods. Gradually, through the years additional items were added to approach more nearly the scope of the private label programs of the giant national chains. (GX 1, A. 367; Fenn, A. 27-30.)

There are vast numbers of labels with which Topco brands compete, and even today Topco-branded products represent a very minute fraction of the national and various local markets in which they are sold.[9] In Topco's fiscal year ended March 31, 1968, retail sales of Topco-branded products represented about .24% of total retail food store sales. Even in the specific markets where Topco-branded products are sold, they represent a very small fraction of the market. In 1963, the last year for which such figures were available, Topco-branded products represented local market shares ranging from .26% to 1.48% and .34% in all of the areas where Topco members were licensed.[10]

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9. By way of example several witnesses testified as to the large number of labels available in their marketing areas on a small cross section of product categories. In the Boston area alone, the following numbers of labels were available in the designated product categories (Davis, A. 257-258):

	Manufacturers' Brands	Private Labels
Canned peaches	20	15
Coffee	22	14
Canned Milk	9	15
Canned Peas	21	15
Jams & Jellies	30	14

10. Retail food store sales in 1967 were $74,195,000,000 (Pretrial Stipulation A. 14); and estimated retail sales of Topco brands were $180 million for that period or about .24% (Fenn, A. 59).

The schedule in Appendix A, attached, sets forth the local market

2. Structure and Operation of Topco.

Topco Associates, Inc. is a cooperative corporation organized under the laws of the State of Wisconsin; it is owned and controlled by its members (F. 1, 2, A. 554). Each member, regardless of size, holds the same nominal amount of common stock, the only class of stock with voting rights. Members own preferred stock according to a formula based upon total retail sales for the previous year. The preferred stock and bank credit provide the working capital requirements of Topco. The Topco Board of Directors consists of 14 persons who are primarily, but not entirely, representatives of Topco members. The Topco Board, as well as its officers, include permanent employees of the cooperative. (F. 15, 17, A. 557-558; Davis, A. 762; GX 6, R. 34.)

Topco is operated by a large staff located at Topco's offices and field procurement facilities. Topco's procurement functions are complex and extensive, involving the development of specifications, product selection, purchasing, testing and quality control, label and packaging design, production and modernization, and product distribution arrangements. (F. 6, A. 555.)[11]

As the district court found, Topco members are small or medium sized supermarket operators with the exception of two members which themselves are retailer-owned

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shares represented by Topco-branded products for each Topco member. With only one exception these market shares are a fraction of one percent.

11. The government's description of Topco as a "marketing corporation" evidences its continuing lack of understanding concerning Topco (GB, p. 3). Topco's sole function is product procurement, not marketing (F. 4, A. 554; Fenn, A. 44). The further characterization of Topco as "no more than the instrument by which its owner-member supermarket chains effectuate their marketing arrangements" is not only contradicted by the record but seemingly inconsistent with the government's own statement of the facts. (Compare GB, p. 19 with GB, pp. 3-4.)

cooperative wholesalers (F. 3, A. 554).[12] Topco members are located essentially in different parts of the country. Each operates in competition with national and large regional chains, as well as numerous smaller chains and independents. (F. 13, A. 557.)

The collective size of the members of Topco and other similar organizations is competitively significant only with respect to the vital functions of procurement, quality control, research and product development. And here size is of crucial importance. The collective buying volume of Topco members permits the cooperative to procure a full range of quality and cost competitive private label prod-

12. The government's effort to convey the impression that Topco consists of a group of large chains is misleading (GB, pp. 5-6). For example, the government asserts that "nearly all" Topco members are among the 75 largest chains; in fact, 9 of Topco's 26 members in 1967 were included in the largest 75 chains (and then only if the two members which are subsidiaries of larger companies are included) (A. 17-21). In any event, the top 75 chains represent a vast proportion of *all* chain sales, for, as the district court found, the top 25 chains represent 85.6% of total chain sales. The second 50 chains represent a combined volume of less than A & P, the number one chain. (F. 19, A. 558; Applebaum, A. 159.) The government singles out Star Market Co. and Eagle Food Centers which are characterized as divisions or subsidiaries of very large chains in 1967. As a matter of fact, Eagle was not a subsidiary of Lucky Stores in 1967. It later was acquired by Lucky Stores but then resigned from Topco. (Fenn, A. 123.) For many years Star Market was a Topco member in the Boston area. It was later acquired by Jewel and remains wholly autonomous. (Tr. 644-645, GX 19.)

The government also sets out a selection of estimated market shares of three Topco members in several cities and asserts that Topco members are the "dominant" chains in these areas. The record, however, reveals that in Washington, D. C., for example, Safeway, not Giant, was the dominant chain and in 1965 accounted for 30% of the market; in Portland, Oregon, Safeway had a 21% market share (DX 1, pp. 391, 392). Even if the government's figures are accepted, the average market share of Topco members for those areas included was 12.7%. However, a more accurate statement of market position may be determined from GX 104, A. 442-443, and GX 106 as reflected in the district court's Finding 12 which reveal market shares ranging from 1.4% to 16.3%, and an average market share of 5.87% (A. 556-557).

ucts comparable to those enjoyed by the large chains. (F. 32, A. 562; DX 1, A. 485; Barnes, A. 356-358.) Topco, of course, has nothing to do with other products sold by its members but not procured through Topco; such products represent about 90% of Topco member sales (Opinion, A. 546; F. 5, 10, A. 555, 556).[13]

The members of Topco are distinct and separate corporations. There is no pooling of earnings or profits to offset the unprofitable operation of one with the income of another. There is no pooling of resources to tap capital markets or to make the resources of one available to support the expansion of another. There is no pooling of management to draw on the capacities of one managerial group to solve the problems of another. There is no integration of promotional resources or common corporate identity to permit combined advertising. Each Topco member succeeds in the marketplace as an independent entity or he does not succeed at all. (F. 3, A. 554; Barnes, A. 356-357.)

Topco membership is for most companies a stage in their economic growth. They join Topco because of their competitive need for an efficiently procured private label program. They grow during, and as a result of, their membership in Topco. Historically, when they grow to sufficient size to support their own private label program, they leave Topco. Any Topco member may resign on 60 days notice. (F. 55, A. 566; Newman A. 277; Meijer A. 293-294; DX 9, A. 516; DX 12, A. 519; DX 17, A. 523; GX 5, A. 382-383.)[14]

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13. Even in this collective procurement function affiliated groups are not equal to the large chains. Because of the loose and transitory nature of their affiliation they lack the coordination, continuity and access to capital enjoyed by the large integrated chains (DX 1, A. 473).

14. Within the last three years before trial five of Topco's largest members withdrew and established their own private label programs (Pretrial Stipulation, A. 15; Fenn, A. 123-124; DX 7-17, A. 512-523).

Thus, Topco membership is not static. There have been rather frequent additions and losses as new, smaller members enter and old, larger members leave. Topco management is constantly seeking to add new members to Topco in areas where distribution of Topco-branded products is limited or non-existent. (F. 54, A. 566; Fenn, A. 75.)[15]

3. Trademark Licensing of Topco Private Brands.

a. *Origin and Purpose.*

When first adopted, the Topco brands had no consumer recognition and therefore no commercial value in the marketplace. Each member was required to establish the collectively owned mark in his trading area so that it would become identified as his own private label. Such an undertaking involved modifying relationships with existing suppliers, personnel changes, new merchandising approaches and strategies and, of course, the considerable investment in establishing and developing consumer acceptance. A fundamental business commitment of this magnitude did not make economic sense unless, like the giant national chains, each operator could offer his customers a line of his own private label products which would be and remain truly private, and thus competitively effective. (F. 3, 24(b), 35, A. 554, 560, 562; Fenn, A. 58; Newman, A. 285-286; Applebaum, A. 176, 186; Cooke, A. 235; Loeb, A. 310-311, 317.)

Only by virtue of each member's individual investment would commercial value be given to Topco brands in specific markets. If others were privileged to trade upon the good will thus created by the member who introduced and

15. There is no evidence that Topco is a restricted organization; the district court specifically found to the contrary (Opinion A. 552; F. 55 A. 566). The government refers to a statement of intention by an applicant to close or sell a store, but the record establishes that this statement was not made in response to any request or suggestion of Topco (Fenn, A. 80).

established the Topco brands in his market, not only would this value be diluted, but the Topco brands would cease to serve their intended purpose as the private label of each co-operative member. (DX 23, A. 535; F. 43, A. 564.) Therefore, the founders of Topco recognized that to fulfill its purpose of providing private brands to its members, the trademarks must be licensed to each in the marketing areas where he operated stores.[16] This would permit maximum flexibility in the operations of the members. (F. 4, 36-48, A. 554-555, 562-565; DX 23, A. 534-535).

Each member thus remains free to operate independently; each can adopt his own merchandising strategy, price his merchandise as he wishes, advertise and promote his products as he sees fit, and exercise his absolute discretion as to locations and number of stores he chooses to open (F. 3, A. 554).

b. *Topco Licensing Procedure.*

Topco members receive trademark licenses for their trading areas, in most cases on a county basis. This licensing procedure was administratively manageable and kept the Topco staff informed of the areas of the country where Topco-branded products were being used by the members. Such information permitted the most efficient arrangements with respect to procurement planning, establishing local suppliers, coordinating distribution, and routing products along the most direct traffic patterns. It also gave direction to Topco in seeking new members in areas of the country where sale of Topco brands was limited or non-existent. (Fenn, A. 89.)

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16. Judge Will specifically found that many members would not have joined Topco and many prospective members will not join without the assurance of exclusive use of Topco brands in their primary marketing areas (F. 35, A. 562). Furthermore, the court observed that absence of exclusivity would result in the "demise" of Topco (Opinion, A. 553).

In the 1940's, when the coöperative was becoming established and there were only small and relatively few members, the licenses were primarily designated as exclusive (Fenn, A. 92). Through the years, increasing competitive pressures required increased efficiency and the need to obtain new members. The concepts of market coverage and trading area emerged as standards considered by the Topco Board of Directors in determining the type of license to be granted. Generally, exclusive licenses are granted to an applicant in trading areas where his store coverage is centered. In areas where store coverage is more limited, coextensive and nonexclusive licenses are normally granted. In such areas extensive advertising in daily newspapers is usually not economically feasible and there is no opportunity for multi-store promotional activities. It is therefore more difficult to establish an identification and acceptance of private brands. (F. 39, A. 563; Fenn, A. 79, 221-223; Loeb, A. 318.)

Historically, even coextensive and nonexclusive licenses have tended to be de facto exclusive. This has been true largely because Topco members are geographically so widely dispersed that other members have had no occasion to apply for a license in those counties. In other instances one of two members in a licensed area has left Topco. Occasionally, two members have operated stores in a licensed county, although in different trading areas thereof. (Fenn, A. 80, 100-101.)[17]

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17. The government observes that two or more Topco members are sometimes found in neighboring states, but fails to point out that their trading areas are in entirely different markets often hundreds or thousands of miles apart (See map, Appendix B, attached). In one instance the government alleges that six Topco members were "located" within 200 miles of Chicago (GB, p. 6). The government fails to disclose that included in this cryptic statistic are: one member operating principally in Columbus, Ohio, but with one store in Evansville, Indiana (well over 200 miles from Chicago); one member operating primarily in Nebraska and Iowa, but with several leased food departments in discount stores in Wiscon-

c. *Expansion of Topco Members.*

Growth and expansion is naturally in the interest of each member and the cooperative as well. Topco members do grow and expand just as rapidly as their resources permit, and they expand whenever and wherever they choose with as many stores as they wish. (F. 45, A. 564-565; Fenn, A. 75-80; Cooke, A. 239-240; Newman, A. 284; Meijer, A. 298-300; Barnes, A. 360; GX 99.) Topco members may or may not wish to use Topco brands in areas into which they expand. If the new area is rather remote from a member's warehouse, for example, he may choose not to use Topco and never request a license. (Fenn, A. 66-67.) If a member does intend to request a license for an area into which he is expanding, he informs Topco of his intention. This assists Topco in planning, establishing and maintaining sources of supply, anticipating future supply requirements, and planning for future growth and new member development. (F. 42, A. 563-64; Fenn, A. 89-90, 128-129; Newman, A. 282-283.)

After a member acquires or begins construction of a new store in an unlicensed area, and if he wishes to carry Topco brands, a license will be granted. Generally, since Topco members are able to expand into new areas with only one or two stores at a time, they will initially be granted a nonexclusive or coextensive license. (Fenn, A. 64, 89-90; GX 14; GX 48.) When a member requests a license for a new territory, other members are permitted to express their views on whether it should be granted so as to avoid exclusive licensing of a county in the event that more than one member may have plans to sell Topco

sin at which Topco brands are not used; one member with stores only in Michigan; one member operating only in Wisconsin; and one member operating a single leased department in a discount store in Bloomington, Illinois. During 1965, the period referred to by the government, no Topco member operated any stores in the Chicago metropolitan area. (Pretrial Stipulation, ¶¶ 22, 23, R. 43.)

products in the same county, though perhaps a distinct trading area.[18]

If a situation were to arise where a Topco member desired to use Topco products in an area which is exclusively or coextensively licensed, the Board of Directors could change the license to coextensive or nonexclusive, provided a member's primary marketing area is not involved. The consent of no member is required. (GX 5, A. 396-397.)[19]

Whether or not a trading area is primary (or "prime") depends upon a range of factors, including, among others, the geographic and population size and type of market; its distinctness as a trading area; the number and types of stores which are already there; the level of supermarket saturation in the area; available sites in the area; the nature of the member operations in terms of size, type,

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18. The government's characterization of this procedure as an opportunity for Topco members to object to others' "expansion plans" is simply wrong. The very exhibit cited in support of this statement refers to requests for *licenses* and not *construction* of new stores. (GB, p. 9; GX 71, A. 428.) Under Topco's procedure a license may not even be requested until *after* store construction has begun (Fenn, p. 129; GX 74, GX 75). Indeed, a member would not even know of other members' expansion plans except with reference to those stores for which a Topco license is expected to be sought (GB, p. 9; F. 45, 47, 48, A. 564-565; Fenn, A. 89-91, 129-134; Newman, A. 282-285; GX 77, A. 429).

Contrary to the government's assertion, no "consent" for expansion is required (GB, pp. 8, 19). The portions of the record relied upon by the government offer absolutely no support for this proposition. In fact, the evidence is uncontradicted that a member has never failed to build a new store because it was unable to obtain a license (Fenn, A. 115-116). The record demonstrates that members have not been foreclosed from expansion; on the contrary, Topco membership has accelerated expansion (Cooke, A. 239-240; Davis, A. 263; Newman, A. 284).

19. In 1961 the territory committee was established to facilitate such reclassifications. Due to the geographic separation of members, however, there have been no requests for this committee to consider since 1962 and it has been inactive. (Fenn, A. 95-99; DX 24, A. 536; GX 5, Art. IX, A. 396.)

number of stores, office and warehouse locations; the member's potential and plans for further developing the area; and the prospect of obtaining other members in the region. In essence, a primary territory is a vital marketing area for the member and one in which he expends considerable effort and promotional dollars establishing Topco brands and building an identity of those brands with his stores. (F. 44, A. 564; Fenn, A. 78-79, 92-94; Cooke, A. 240; Loeb, A. 320; GX 5, A. 397.)

Topco members may freely move into another's primary marketing area. In such instances, the expanding member can use wholesaler controlled labels or one of many cooperative private brand sources, most of which provide warehouse facilities. (F. 42, A. 563-564; Newman, A. 282-283; DX 3, pp. 167-220.) Topco members have indeed expanded into other members' licensed areas and, as the district court found, the licensing practices have had no appreciable influence on such expansion (F. 45, A. 564-565).

Despite the expansion of Topco members, they are still operating in essentially different marketing areas of the country. The reason is that Topco members have historically been located in different areas, and Topco's new member development program is specifically aimed at obtaining members where distribution does not currently exist. In fact, as a result of withdrawals of larger members to develop their own programs, more area exists today not licensed to any Topco member than existed 10 years ago, including more than half of the major centers of population in the nation. (F. 13; A. 557; Appendix B, attached.)

SUMMARY OF ARGUMENT.

At the outset of trial the government candidly admitted that there is no Sherman Act case which would justify a motion for summary judgment (A. 26).[20] Accordingly, Judge Will conducted a full trial on the merits consistent with the admonition of this Court that new per se rules should not be adopted without examination of the "economic and business stuff out of which these arrangements emerge." *White Motor Co.* v. *United States,* 372 U. S. 253, 263 (1963).[21] At the conclusion of the trial the Court ruled that the Topco licensing provisions have no "substantial adverse effect on competition in the relevant market" and that the government failed to prove a violation of the Sherman Act (C. 4, 5, A. 567).

The government does not now contend that it proved or even attempted to prove that Topco licensing procedures resulted in an unreasonable restraint of trade (GB, p. 16).[22] Seemingly by its own admission, therefore, the government

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20. Likewise, in its Jurisdictional Statement to this Court the government pointed out that the Court has never applied the per se principle "in a case involving horizontal market division, unaccompanied by price-fixing or similar trade restraints" (Juris. Statement, p. 8).

21. The government's evidence consisted of 132 documentary exhibits concerning the operations of Topco and its members, and the defendant offered documentary evidence and live testimony concerning the food industry and Topco's role within it. The government's insistence, therefore, that "there was no occasion for the court to consider the evidence dealing with the economic consequences of these challenged practices" is not well taken. (GB, p. 25.)

22. The government nevertheless urges that certain inferences drawn by it out of the context of the record demonstrate adverse competitive impact (GB, p. 16, 17). These inferences were vigorously urged on the district court which rejected them and found the practices in issue "reasonable and in the public interest" (C.4, A. 567). Such inferences cannot undermine the "considered judg-

has failed to sustain its burden of proof unless it is granted the aid of a per se rule of illegality which it now claims is available. At the same time the government concedes that certain territorial restraints even among competitors may not be unlawful, but volunteers no legal standard by which to test such restrictions (GB, pp. 20-21, 35). An analysis of the cases discloses the existence of such a standard.

From the earliest Sherman Act cases, this Court has consistently recognized that a rigid prohibition of all restraints of trade would be unintelligible and unworkable. *Hopkins* v. *United States,* 171 U. S. 578 (1898). Based upon English common law principles, the standard of reason was developed as a fundamental Sherman Act doctrine. *Standard Oil Co. of N. J.* v. *United States,* 221 U. S. 1 (1911); *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918). An integral element in this approach has been a distinction between those naked restraints presumed to be illegal because of their "pernicious effect on competition and lack of redeeming virtue" and those restrictions which are merely ancillary to the main purpose of a lawful and often pro-competitive arrangement. *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U. S. 211 (1899).

This distinction, fashioned in the common law and refined by decades of American jurisprudence, offers the certainty and efficiency of per se rules of illegality and yet circumscribes a relatively narrow area in which legitimate and desirable arrangements necessarily involving some restriction may lawfully operate. Simply expressed, this concept holds that when a challenged restriction is subservient or ancillary to an arrangement which is itself

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ment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341 (1949).

lawful, reasonably related to achievement of the legitimate business arrangement, and not adopted by parties with monopoly power, the practice is not per se unlawful but must be tested by its market impact. Lower courts have consistently implemented this doctrine to the benefit of the public. *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S. D. N. Y. 1960); *United States* v. *National Football League*, 116 F. Supp. 319 (E. D. Pa. 1953); *United States* v. *Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953); *Denison Mattress Factory* v. *Spring-Air Co.*, 308 F. 2d 403 (5th Cir. 1962); *see also* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part I, 74 YALE L. REV. 775 (1965).

The record reveals that Topco's licensing practices meet this standard of legitimate ancillary restraints. Judge Will found that Topco members are small or medium sized firms scattered in essentially different markets across the country. For the purpose of meeting private label competition offered by the larger, integrated chains, the Topco cooperative was organized. Through it, each owner-member was enabled to procure his own private label products and thus to offer more effective competition in the marketplace. New products were introduced, the consumer's choice was expanded, competition was heightened and many small suppliers of Topco products were benefited. Therefore, the district court concluded that the cooperative was a lawful, indeed a procompetitive endeavor. (C. 3, A. 567.)

Furthermore, Judge Will determined that the licensing provisions are "ancillary and subordinate" to the achievement of Topco's objective because they permit each member to undertake the development of his private labels in his trading area and to build an identification of these brands with his stores (C. 4, A. 567). If at some future time the value each member would give to his private labels could be appropriated by others and thereby de-

stroyed, the private labels would no longer serve their particular and important competitive purpose. The potential Topco member, who needs a private label program truly private like those of his stronger rivals, would be unwilling to undertake the substantial investment in a cooperative program that would not fulfill his need.

Upon the entire record the trial court determined that Topco's licensing provisions did not adversely affect competition (Opinion, A. 553; C. 4, A. 567). In so concluding, the court recognized that even any *theoretical* effect could not be significant since Topco products represent insubstantial market shares. In relevant trading areas Topco brands average only about .34% of food sales (F. 10, 12, A. 556-557; Appendix A, attached). Even so, the theoretical adverse effects suggested by the government do not exist. As the district court further found, the licensing provisions do not result in any appreciable influence on expansion nor do they give the members any power to influence price formation (F. 45, 46, A. 564-565). To the contrary, Judge Will concluded, the relief sought by the government would not increase, but would substantially diminish, competition in the supermarket field (Opinion, A. 553).

Thus, after a full trial on the merits, Judge Will determined that the licensing provisions were ancillary and reasonably related to a procompetitive purpose, had no substantial adverse competitive effect and advanced the public interest. To argue, as the government does, that these determinations by an informed and able trial judge are to be entirely ignored because the Topco licensing provisions can simply be characterized as per se illegal seems to defeat the very purpose which underlies the per se concept. Here, the economic consequences have been considered and the practices challenged have been found not to be "so devoid of potential benefit or so inherently harmful" as to be illegal per se.

If the antitrust laws are to serve the purpose of protecting competition, the per se rule cannot be stretched to prohibit by conclusive presumption a practice which has been proven and found to promote competition. It should not be applied here to prohibit trademark licensing provisions of a cooperative private label program which can continue and contribute new products and new competition only because those provisions exist. To do so would prejudice the struggle of smaller businesses to grow and challenge their stronger rivals, and in an industry already dominated by large integrated chains would stimulate further concentration.

ARGUMENT.

I. TOPCO LICENSING MUST BE MEASURED AGAINST THE STANDARD OF ANCILLARY RESTRAINTS.

The government urges this Court to condemn Topco's licensing program as unlawful per se, yet it concedes that territorial restrictions are not always anticompetitive, but only "generally" so (GB, pp. 16, 20-21).[23] What standards then should govern the application of the per se doctrine? The government proposes none, an approach which can hardly contribute to the "reasonable certainty and predictability in application of antitrust law," which it purportedly seeks (GB, p. 34).

A review of the cases, however, does reveal a rational and internally consistent standard which utilizes the administrative efficiency of per se concepts where appropriate, while at the same time permitting preservation of competitively beneficial practices which of necessity involve some restrictions. This standard had its origin in the English common law where the doctrine of ancillary restraints was judicially employed to encourage economically desirable transactions by defining an exception to the otherwise rigid ban on restraints.[24]

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23. In *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), the government's brief, at pp. 25-26, explicitly recognized that ancillary territorial restrictions may be lawful to achieve a competitively desirable purpose:

> We do not suggest that all restrictive agreements that are illegal per se when considered alone are also illegal per se if adopted in the context of a joint venture. Such agreements may be legal when necessary to further the purposes of a legitimate such venture. See *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 178 (S. D. N. Y.).

24. A summary of the early common law cases applying the doctrine of ancillary restraints is found in *United States* v. *Addys-*

The common law doctrine of ancillary restraints was imported into this country and approved by the Court in *Oregon Steam Navigation Co.* v. *Windsor,* 87 U. S. 64 (1873) and *Fowle* v. *Park,* 131 U. S. 88 (1889). It was subsequently adopted as a fundamental Sherman Act principle in *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U. S. 211 (1899). There, Judge Taft, later Chief Justice, drew the basic and still valid distinction between those naked restraints, unaccompanied by any purpose except the suppression of competition, and covenants which are appurtenant to a primary and legitimate business purpose. Such covenants are not unlawful if

> . . . merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. 85 Fed. at 282.

See also, *United States* v. *Joint Traffic Assn.,* 171 U. S. 505, 569 (1898); *Cincinnati P. B. S. & P. Packet Co.* v. *Bay,* 200 U. S. 179 (1906) (upholding an agreement between competitors to refrain from competing in certain areas in connection with the sale of business property).

In succeeding cases before the Court, this doctrine formed the basis of a "standard of reason" by which the courts have distinguished between agreements which have no purpose or effect but restriction of competition and those which have only an incidental effect in the interest of creating new efficiencies.[25]

Experience has confirmed that some practices demon-

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ton Pipe & Steel Co., 85 Fed. 271, 281 (6th Cir. 1898), *aff'd,* 175 U. S. 211 (1899); *see also, United States* v. *Arnold, Schwinn & Co.,* 388 U. S. 365, 391-392 (dissenting opinion); RESTATEMENT OF CONTRACTS §§ 515, 516 (1932).

25. This rule of reason, first given expression in *Standard Oil Co. of N. J.* v. *United States,* 221 U. S. 1 (1911), was classically

strate, without elaborate inquiry, no purpose but the elimination of competition and no potential for the creation of efficiencies or the furtherance of consumer welfare. Such naked restraints are presumed to be illegal because of "their pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958). Accordingly, combinations among competing firms to fix prices, carve up markets or otherwise act in concert for the paramount purpose or necessary effect of eliminating competition to the injury of the consumer have been stricken down as per se unlawful. The classic cartel cases are illustrative. *See, e.g., United States* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927); *United States* v. *National Lead Co.,* 332 U. S. 319 (1947); *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951).

Although the per se approach has great utility in cases involving such inherently anticompetitive practices, and doubtless expedites antitrust enforcement, the courts have consistently refused to invoke the per se doctrine mechanically and without regard to competitive realities. The well established principle of ancillary restraints, as originally articulated by Judge Taft and developed in later cases, serves to assist courts in a threshold determination of the

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articulated by Justice Brandeis in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238 (1918):

> . . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

applicability of per se concepts. While the courts have not always articulated this process in the same terms, it is apparent that such an approach has been consistently pursued.[26]

This Court and lower federal courts have accordingly upheld challenged practices as reasonable, even though within categories typically characterized as per se unlawful. For example, even price control agreements have been held

26. A broad range of competitive practices have been upheld under this ancillary restraints concept. Exclusive market covenants among actual or potential competitors have been sustained in joint venture cases: *United States* v. *Penn-Olin Chemical Co.*, 217 F. Supp. 110, 134-37 (D. Del. 1963), *vacated* (although the Court found no Section 1 violation on record), 378 U. S. 158 (1964), *remanded* (on Section 7 claim), 246 F. Supp. 917 (D. Del. 1965), *aff'd*, 389 U. S. 308 (1967); *United States* v. *Pan American World Airways, Inc.*, 193 F. Supp. 18 (S. D. N. Y. 1961), *rev'd on other grounds*, 371 U. S. 296 (1963); *United States* v. *National Malleable & Steel Castings Co.*, 1957 Trade Cas. ¶ 68,890 (N. D. Ohio 1957), *aff'd per curiam*, 358 U. S. 38 (1958). *See also United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-99 (S. D. N. Y. 1942), *modified and aff'd*, 321 U. S. 707 (1944). The allocation of selling time among competitors has been repeatedly sustained under the same principle in the tobacco board cases. *See, e.g., Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F. 2d 502 (4th Cir. 1959).

Other practices upheld under the doctrine include: (a) Joint selling and service agency agreements. *See, e.g., Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344 (1933); *Parmelee Transportation Co.* v. *Keeshin*, 186 F. Supp. 533 (N. D. Ill. 1960), *aff'd* 292 F. 2d 794 (7th Cir. 1961), *cert. denied* 368 U. S. 944 (1961); *Bridge Corp. of America* v. *American Contract Bridge League, Inc.*, 428 F. 2d 1365 (9th Cir. 1970). (b) Covenants not to compete. *See, e.g., Thoms* v. *Sutherland*, 52 F. 2d 592 (3d Cir. 1931); *Goldberg* v. *Tri-State Theatre Corp.*, 126 F. 2d 26 (8th Cir. 1942); *Tri-Continental Financial Corp.* v. *Tropical Marine Enterprises, Inc.*, 265 F. 2d 619 (5th Cir. 1959). (c) Exclusive licensing. *See, e.g., Susser* v. *Carvel Corp.*, 206 F. Supp. 636 (S. D. N. Y. 1962), *aff'd* 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U. S. 125 (1965); *United States* v. *Paramount Pictures, Inc.*, 66 F. Supp. 232 (S. D. N. Y. 1946), *modified* 334 U. S. 131; (d) Exclusive dealerships. *See e.g., Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir. 1953), *cert. denied*, 345 U. S. 994 (1953). (e) Territorial restrictions. *See, e.g., Sandura Co.* v. *FTC*, 339 F. 2d 847 (6th Cir. 1964); *Snap-On Tools Corp.* v. *FTC*, 321 F. 2d 825 (7th Cir. 1963).

reasonable in appropriate contexts. Thus, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918), Justice Brandeis held that a grain exchange regulation restricting free price formation during non-trading hours was a reasonable restraint in view of its relation to a beneficial and legitimate purpose.

More recently, in *United States* v. *Morgan*, 118 F. Supp. 621, 689 (S. D. N. Y. 1953), Judge Medina rejected the government's contention that agreements among investment bankers concerning security prices were per se illegal. The agreement to maintain a fixed schedule of prices in connection with the investment syndicate's orderly distribution or placement of a new issue was found to be a reasonable concomitant of the entire underwriting operation which "serves a legitimate business and trade-promoting purpose." The system, Judge Medina found, was necessary to the function of the cooperative enterprise, which he characterized as "not a static 'mosaic' of conspiracy but a constantly changing panorama of competition."[27]

In *United States* v. *National Football League*, 116 F. Supp. 319 (E. D. Pa. 1953), territorial market allocations were attacked as per se unlawful. There the government charged that a by-law of the National Football League prohibiting the television broadcast of certain games into specified territories constituted an allocation of marketing territories among competitors. The Court rejected a per se approach and found that the provision was essential to keep the weaker teams in fairly even competitive balance with the stronger teams, and probably essential to their existence:

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27. In *United States* v. *Container Corp.*, 393 U. S. 333 (1969), wherein the government charged a price fixing conspiracy it was recognized in the majority, the concurring and dissenting opinions that the *effect* of the practice should at least be considered. 393 U. S. at 337, 339, 341. *See also, Sun Oil Co.* v. *Vickers Refining Co.*, 414 F. 2d 383 (8th Cir. 1969).

> An allocation of marketing territories for the purpose of restricting competition . . . is not always illegal. There is no simple formula "to displace the rule of reason by which breaches of the Sherman Law are determined. Nor is 'division of territory' so self operating a category of Sherman Law violations as to dispense with analysis of the practical consequences of what on paper is a geographic division of territory." 116 F. Supp., at 322.

Similarly, in *United States* v. *E. I. du Pont de Nemours*, 118 F. Supp. 41 (D. Del. 1953) *aff'd on other grounds*, 351 U. S. 377 (1956), the court, applying the doctrine of ancillary restraints, upheld territorial limitations incidental to a valid joint venture and know-how license arrangement. The validity of territorial limitations in know-how licenses was also recognized by the Court in *Dr. Miles Medicine Co.* v. *John D. Park & Sons, Co.*, 220 U. S. 373, 402 (1911).[28]

As illustrated by these cases, the courts in appropriate competitive settings have refused to allow a blind applica-

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28. *See*, Barton, *Limitations on Territory, Field of Use, Quality and Price in Know-How Agreements with Foreign Companies*, 12 ANTITRUST BULL., 243, 246-255 (1967). In other per se categories seemingly similar restrictions have also been upheld. Tying arrangements have been found to be unlawful per se. *See, e.g., International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *cf. Northern Pacific Ry.* v. *United States*, 356 U. S. 1, 5 (1958). But other cases have held that such arrangements are not necessarily so. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953); *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1st Cir. 1961), *cert. denied*, 368 U. S. 931 (1961); *Baker* v. *Simmons Co.*, 307 F. 2d 458 (1st Cir. 1962); *Susser* v. *Carvel Corp.*, 206 F. Supp. 636 (S. D. N. Y. 1962), *aff'd*, 332 F. 2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U. S. 125 (1965); *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 498-501 (1969).

The so-called group boycott has in some cases been characterized as a per se offense. *See, e.g., Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). Yet in *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), the Court suggested that even boycotts may be removed from the per se category by a "justification derived from the policy of another statute *or otherwise*." 373 U. S., at 348-49. (emphasis supplied). *See also Union Circulation Co.* v. *FTC*, 241 F. 2d 652, 656-57 (2d Cir. 1957).

tion of the per se rule to work an ultimately anticompetitive result.[29] But this does not require detailed economic analysis in every case. The doctrine of ancillary restraints is available to assist in the identification of those restrictions which have a capacity to create rather than diminish competition.[30] This concept permits a court to make a determination prior to trial, if existence of a restraint is undisputed, or at any time during trial as to whether the practice in issue is subsidiary to a lawful, beneficial arrangement and reasonably related to its operation. If the restriction is one traditonally regarded as per se and has no reasonable relation to a lawful endeavor, or if the parties possess monopoly power, a per se rule should be applied. If, however, it appears from the pleadings or the proof that the restriction may be reasonably related to the successful operation of a lawful and beneficial arrangement, further inquiry into its necessity and overall impact on competition will be under-

29. The pragmatic advantages of a rigid per se rule to a government enforcement agency cannot justify the danger created by ignoring the question of whether a practice promotes or restrains competition. Former Federal Trade Commissioner Philip Elman cautioned against such misuse of the per se rule:

> . . . [I]t is surely improper to dispose of an antitrust case by invoking a per se rule unless the challenged practice really fits the policy and rationale of the rule. If the rule must be stretched, or its language wrenched from context, to include the practice under it, the result will be to outlaw a business practice without any analysis of, or practical experience with, its actual competitive effects and possible economic justification. Elman, *Petrified Opinions and Competitive Realities*, 66 Col. L. Rev. 625, 627 (1966).

Suppose, for example, Commissioner Elman said, that a number of small grocers engaged in cooperative buying, warehousing, distribution, and advertising activities. Those activities might "promote, not prevent or destroy competition," if considering market realities the participating stores were not "in competition with each other but with the large chain stores" and if otherwise "the competitive position of each [might] be critically undermined." 66 Col. L. Rev. at 633-34. *See also*, Timberg, *Territorial Exclusives*, 56 Trademark Rep. 1 (1969).

30. Van Cise, *The Future of Per Se in Antitrust & Law*, 50 Va. L. Rev. 1165 (1964).

taken (A. 11, 12).[31] Thus, contrary to the suggestion of the government's brief, adoption of something other than a per se rule in this case would not subject the courts to interminable economic inquiries (GB, pp. 34-35). The judicial economy inherent in the per se doctrine would not be at all impaired, and such legal certainty as can reasonably be expected in a complex economy would be provided.

The elements of this approach were concisely articulated by Judge Herlands in *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153 (S. D. N. Y. 1960), which involved an arrangement whereby two motion picture producers, Universal and Columbia, agreed to give a subsidiary of Columbia the exclusive license for television exhibition of their films. The government attacked the arrangement as a violation of § 1 of the Sherman Act, charging price fixing and elimination of competition in film distribution. The Court rejected the per se approach and found the arrangement reasonably ancillary to the marketing of the films of Universal which did not have distribution facilities:

> Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate, the decision is not determined by a *per se* rule. The doctrine of ancillary restraints is to be applied. It permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in

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31. Such a preliminary factual determination is required to identify per se offenses in other contexts. For example, only those tying arrangements which involve products over which a party has sufficient economic power to appreciably restrain competition and a "not insubstantial amount of commerce is affected" are per se unlawful. The legality of other tying arrangements must be measured by their purpose and effect. *Fortner Enterprises,* v. *United States Steel Corp.,* 394 U. S. 495, 499-500 (1969).

the market place; and (3) is not imposed by a party or parties with monopoly power. 189 F. Supp. at 178.[32]

The most recent pronouncements of this Court are consistent with application of the doctrine of ancillary restraints and evidence a continuing concern with the competitive impact of challenged practices.

In *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), despite the urging of the government, this Court refused to rule that territorial licensing restrictions among a group of mattress manufacturers in themselves violated the Sherman Act. The Court instead examined the context of the restrictions and concluded that the group's activities, which included flagrant and pervasive price-fixing, constituted "an aggregation of trade restraints" under the settled precedent of the *Timken* case. 388 U. S. 354-355. The Court noted that "the territorial restraints were a *part* of the unlawful price-fixing and policing." 388 U. S. at 356 (emphasis supplied). This, of course, precluded application of the ancillary restraints concept which was urged by Sealy. Mr. Justice Fortas, however, went on to distinguish the holding from other "quite different" situations such as those involving territory restrictions adopted by grocers in the interest of more effective competition. 388 U. S. at 357.

A remarkably similar situation without price-fixing was upheld in *Denison Mattress Factory* v. *Spring-Air Co.*, 308

32. Another formulation of the ancillarity principle has been provided by Professor Robert H. Bork who states that market divisions among competitors should be upheld if:

> (1) the agreement accompanies a contract integration (the coordination of other productive or distributive efforts of the parties); (2) the agreement is ancillary to the contract integration (capable of increasing the integration's efficiency and no broader than required for that purpose); (3) the aggregate market share of the parties does not make restriction of output a realistic threat; and (4) the parties have not demonstrated that their primary purpose was the restriction of output.

Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, Part I, 74 YALE L. REV. 775 (1965); Part II, 75 YALE L. REV. 373, 474 (1966).

F. 2d 403 (5th Cir. 1962). There exclusive territorial limitations imposed in connection with licensing of a trademark were found valid under the ancillary restraints doctrine because "actuated by" and "incidental to" a "legitimate business justification." 308 F. 2d at 408.[33]

As set forth below, the record clearly demonstrates, and the district court correctly found, that Topco's licensing practices flow from a procompetitive endeavor, are reasonably related to achieving the object of this endeavor, are not instituted by parties with monopoly power and do not adversely affect competition (C. 3, 4, A. 567; Opinion, A. 552).

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33. *See also, Engbrecht* v. *Dairy Queen Co. of Mexico, Mo.*, 203 F. Supp. 714 (D. Kan. 1962); *Sealy, Inc.*, 45 F. T. C. 730 (1948); *cf. Huber Baking Co.* v. *Stroehman Bros. Co.*, 252 F. 2d 945 (2d Cir. 1958); *Parkway Baking Co.* v. *Friehofer Baking Co.*, 255 F. 2d 641 (3d Cir. 1958).

Richard W. McLaren, now Assistant Attorney General in charge of the Antitrust Division, has argued that territorial licensing of trademarks among owner licensees continues to be legally defensible. McLaren, *Territorial and Customer Restrictions, Consignments, Suggested Resale Prices and Refusals to Deal*, 37 ABA ANTITRUST L. J. 137, 141-142 (1968); McLaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers and Handling Competitive Products*; 13 ANTITRUST BULL. 161, 170-171 (1968). *See* Note, 22 U. OF FLA. L. REV. 260, 285-286 (1969); *see also*, REP. OF ATTY. GEN. NAT'L. COMM. TO STUDY ANTITRUST LAWS, 87 (1955), recognizing that "valid trademark rights may provide a lawful main purpose to which reasonable restrictions on competition may be properly ancillary and therefore legal."

II. TOPCO LICENSING IS ANCILLARY TO A PRO-COMPETITIVE OBJECTIVE AND DOES NOT UNREASONABLY RESTRAIN TRADE.

A. Topco Licensing is Reasonably Related to Achieving Topco's Lawful Objective.

The government has characterized Topco as a "horizontal market allocation" (GB, p. 16). Characterizations of this type in antitrust law may be convenient as a shorthand description, but they can also be dangerously misleading when incorrectly applied. The term "horizontal market allocation," for example, has always connoted restraints among dominant competitors to divide the market among themselves for the purpose of eliminating competition. However, when such a characterization is used to describe a different business situation which does not result in the same economic consequences, it is erroneous.[34]

The essential nature of Topco and the economic consequences of the practices here in issue are quite different from the familiar "horizontal market allocations" which can be readily recognized as "having no purpose except the stifling of competition." *White Motor Co.* v. *United States,* 372 U. S. 253, 263 (1963).[35] It is inappropriate,

34. It is perhaps for this reason, in another context, that the Department of Justice itself has found the term "horizontal" inappropriate to describe a merger involving two firms selling the same product in different geographic markets. This is classified as "conglomerate" rather than a horizontal merger, even though the firms operate at the same level of distribution. Department of Justice, Merger Guidelines, 1 CCH Trade Reg. Rep. ¶ 4430, p. 6687.

35. The government itself appears somewhat confused by these characterizations. Although having urged in the *Sealy* case that the arrangement there was "horizontal" it now characterizes the arrangement in a quite similar case, *Denison Mattress Factory* v. *Spring-Air Co.,* 308 F. 2d 403 (5th Cir. 1962), as a "vertical sales restriction." (GB, p. 23, n. 16.) *See,* Comment, *Horizontal Territorial Restraints and the Per Se Rule,* 28 Wash. & Lee L. Rev. 475, 469 (1971).

therefore, without an examination of its competitive role to attempt to categorize Topco as a "horizontal market allocation," with all the negative connotations and presumptions which accompany that phrase.[36]

It is undisputed that Topco was formed for the purpose of enabling its members to offer effective competition to the national and larger regional chains through the cooperative procurement of private label products (F. 8, A. 555-556; GX 1, A. 367). The formation of Topco did not eliminate competition in a line of products as in the case of a "horizontal market allocation;" instead it permitted Topco members to introduce a *new* line of products into the market, which they could not otherwise do, thereby creating competition that was never there before. As outlined above, these members realized that if their private labels were readily available to others while the private brands owned by their economically more powerful rivals were absolutely exclusive, Topco labels would not achieve their purpose. There are numerous national, regional and local brands of virtually all food products available, and the substantial commitment required by cooperative membership would not be justified if the return were simply another label commonly available in the trading area.

Accordingly, if Topco was to fulfill the competitive needs of its members, the Topco brands, although cooperatively procured, had to truly serve as the private labels of each member in his principal marketing territory. Licensing the commonly-owned trademarks provided the means to

36. Here, the government seems to urge a stricter rule for partial contract integrations than for total corporate integrations. In the context of joint ventures and mergers, all actual or potential competition is eliminated between the parties, yet the legality of such mergers is measured by competitive effect. *United States* v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964); *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U. S. 665 (1964); *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133 (N. D. Cal. 1967).

accomplish this objective (F. 30, 35, A. 562; DX 23, A. 534).[37] This assured that the value of the mark to each individual member could not be summarily destroyed (Aplebaum, A. 186, 207.; Cooke, A. 242-243; Loeb, A. 310-311, 317-318; Barnes, A. 359-360).

Thus, in establishing its licensing program, Topco was not motivated by a design to establish a division of markets. Considering especially the structure of the market,

37. It has long been recognized that the value of a mark lies in its exclusivity. *Trade-Mark Cases (United States* v. *Steffens; United States* v. *Witteman; United States* v. *Johnson),* 100 U. S. 82, 92 (1879); *Kidd* v. *Johnson,* 100 U. S. 617 (1879). Licensing the use of a trademark or tradename on a territorial basis has been consistently recognized as a legitimate and valuable business practice. *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403 (1916); *E. F. Pritchard Co.* v. *Consumers Brewing Co.,* 136 F. 2d 512 (6th Cir. 1943), *cert. denied,* 321 U. S. 763 (1943); *cf. Standard Oil Co. (Kentucky)* v. *Humble Oil & Refining Co.,* 363 F. 2d 945, 947 (5th Cir. 1966), *cert. denied,* 385 U. S. 1007 (1967). Licensing by specified territory is one of the ways whereby the owner protects the property interest in his trademark. *Denison Mattress Factory* v. *Spring Air Co.,* 308 F. 2d 403 (5th Cir. 1962).

Agreements for the joint and concurrent use of trademarks, providing for restrictions as to their use between the parties, have consistently been upheld as valid. *See, e.g., Chester H. Roth Co.* v. *Esquire, Inc.,* 35 F. Supp. 848 (1949). A license agreement between competitors involving restrictions upon use of the name "Sun Maid" was upheld in *California Packing Corp.* v. *Sun-Maid Raisin Growers of California,* 165 F. Supp. 245 (S. D. Cal. 1958), *aff'd,* 273 F. 2d 282 (9th Cir. 1959).

The Lanham Act contemplates concurrent use of a trademark in separate marketing areas. (60 Stat. 427, 428, 15 U. S. C. §§ 1051, 1052.) *See, e.g., In Re Beatrice Foods Co.,* 429 F. 2d 466 (1970).

It is, of course, well-settled that the patentee may license a patent on an exclusive territorial basis. 35 U. S. C. § 261. *See, e.g., Bement* v. *National Harrow Co.,* 186 U. S. 70 (1902). This Court has indicated that protection of a trademark should not be less:

> . . . The monopoly in that case, [one involving patented articles] is more extensive, but we see no sufficient reason for holding that the monopoly of a trademark, so far as it goes, is less complete. It deals with a delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care. *Boujois & Co.* v. *Katzel,* 260 U. S. 689, 692 (1923).

the dispersion of members in local, generally isolated markets throughout the country, and the small proportion of total grocery sales represented by the founding and the present Topco members, it is unreasonable to attribute to them an intention to allocate markets among themselves or confine their expansion in the hope of somehow easing competitive pressures. In competitive reality, such an arrangement would be meaningless. Topco members were and continue to be concerned with survival and growth in the face of vigorous actual competition from the large national chains (F. 8, 12, 13, A. 555-557; GX 1, A. 367).[38]

Other facts in the record are also incompatible with the argument that Topco members are conspiring to allocate territories, including the applicability of licensing only to Topco brands, the freedom of each Topco member to operate independently and pursue his own marketing strategy, Topco's vigorous effort to locate new members, the vast expanse of the country not licensed and the right of members to resign with 60 days notice. Due to the growth and

38. The government points out that the national chains developed their private labels by virtue of their individual economic power and vertical integration and not as the product of cooperative efforts (GB, p. 16). Yet each of these chains established this economic power largely as a result of numerous corporate acquisitions. For example, between 1930 and 1948 alone, Safeway acquired 2,784 stores, Kroger acquired 2,353 and A&P, 300; during this same period the 10 leading chains acquired over 9,000 stores; between 1949 and 1963 the top twenty chains acquired over 3,000 stores (DX 1, pp. 98, 100, 104). To now argue, as the government does, that those retailers who were unable to assemble similar economic power cannot lawfully cooperate to achieve the efficiencies with which to individually compete with the largest chains lends credence to the criticism that antitrust enforcement in some cases results in injury to competition. J. K. Galbraith, *American Capitalism*, 141 (2d ed. 1956); *Hearings Before Subcommittees of the Select Committee on Small Businesses*, United States Senate, 90th Cong., 1st Sess., 7 (June 29, 1967); J. K. Galbraith, *The New Industrial State*, 184-188 (1967); Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457, 469 (1971).

"graduation" process five of Topco's largest members withdrew during the last three years prior to trial (Fenn, A. 123-124); Topco licensing does not represent a permanent or rigid arrangement, but rather a reflection of the constantly changing panorama of supermarket competition (F. 54, A. 566).

Licensing procedures concerning wholesaling are equally and as intimately related to Topco's purpose of providing private labels to its members. The wholesaling of Topco brands to others in a member's primary marketing area would totally destroy their value as private labels and could thus have an effect even more serious than possession of those brands by a single rival (Fenn, A. 118-119).[39]

It has been Topco's policy to permit wholesaling of Topco-branded products by any Topco member which desires to do so in areas where no other Topco member is licensed. This policy, later codified in a by-law, has afforded maximum flexibility consistent with the purpose of Topco to provide private labels for each of its members. Topco members are, of course, free to wholesale any other products, wherever and to whomever they choose. (Fenn, A. 117-118, 220-221; GX 13; DX 31, A. 538.)

The government concedes that the requirement that Topco members be licensed to wholesale Topco-branded

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39. Topco was formed primarily to serve retailers, and all of Topco's procedures, programs and charges are geared to retailing. For example, Topco's method of computing service charges is predicated upon retail sales volumes. Where members do wish to engage in wholesaling, it has been necessary to work out in each instance a specific method of charges for Topco services. (Fenn, A. 117; GX 61, A. 423.)

There are a number of members which do engage in wholesaling of Topco-branded products. Such wholesaling is generally either to institutions or in areas where few, if any, member's retail stores are located. In other cases Topco members have voluntary groups and operate or franchise stores under a common name. Two Topco members, Frankford-Quaker and Twin Ports, are themselves cooperatives and serve a large number of so-called "mom and pop" stores. (Fenn, Tr. 566, 600, 1019, A. 119-120, 210-212; Dickelman, A. 323-324.)

products was never challenged in its complaint. (GB, p. 12, 24, 25.) Indeed, when reference was first made to wholesaling by government counsel during cross-examination of one of defendant's witnesses, Topco's counsel pointed out that the complaint did not charge any unlawful customer restriction. Judge Will noted, "I am sure if the record established that, Mr. Morrison will ask leave to amend the complaint to conform the pleadings to the proof" (A. 141). The government never sought to amend its complaint although there was ample time to do so. Having failed to put this claim in issue before the district court, the government cannot now inject it as an issue on appeal. *Standard Title Insurance Co.* v. *Roberts,* 349 F. 2d 613 (8th Cir. 1965).[40]

In any event, the government's current theory that both the *Schwinn* case and the group boycott cases render Topco's wholesale provisions per se unlawful represents a further effort to wrench these per se rules from their sound economic context and thrust them into an alien mold.[41] In *Schwinn* this Court was presented with agree-

40. The district court received evidence and made findings of fact on wholesaling procedures as on many other matters not specifically in issue. Although the government made no effort to amend its complaint, the court did rule that the government upon the entire record failed to establish a violation of the Sherman Act (C. 5, A. 567). *See Monod* v. *Futura,* 415 F. 2d 1170, 1174 (10th Cir. 1969).

41. The group boycott cases relied upon by the government are inapposite. Both *United States* v. *General Motors Corp.,* 384 U. S. 127 (1966), and *Klors* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207 (1959) involved concerted efforts to cut off a class of competitors from access to product lines and thereby eliminate price competition. *GM,* for example, concerned a well organized and policed group effort of associations of Chevrolet dealers and General Motors to cut off auto discounters' access to their sources of Chevrolet automobiles. The government did not, nor could it, cite a single example of a purchaser cut off from access to Topco merchandise. No group boycott was ever alleged nor could one be proved. *See Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors Ltd.,* 416 F. 2d 71 (9th Cir. 1969), *cert. denied* 356 U. S. 1062 (1970). *See also* Barker, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U. of Pa. L. Rev. 847, 876-877 (1955).

ments between a large bicycle manufacturer and its distributors and dealers whereby Schwinn controlled the persons to whom, and the territories in which, distributors and dealers could sell Schwinn products. The thrust of the government's effort was to show that the purpose and effect of these restrictions was to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition. The government did not contend that the outlet limitations were per se illegal, but that they were without justification and that the total market effect was clearly to restrain price competition because there was not sufficient offsetting competition from other brands.[42]

The Court examined the effect of Schwinn's outlet limitations upon the market and concluded that its control of the re-sale of its manufactured products after it had already reaped the benefit of an outright sale was unlawful. These restrictions had a direct and substantial adverse impact upon the market to the detriment of the consumer. In contrast, Topco is not a manufacturer like Schwinn attempting to retain control over channels of trade after receiving its reward in the price of the product. The government states that Topco serves as a buying and quality control "agent" by which its principals obtain private brands for sale to retail consumers (GB, p. 24). It is only after such sale that each member realizes a commercial reward on the product and on its investment in the private label. After the members have parted with title, there

42. In its Brief in this Court in the *Schwinn* case, the government pointed out at p. 23 "even if there is an inhibiting effect, it may be offset by a procompetitive impact at another level, or it may be justifiable on other grounds compatible with the policies and objectives of antitrust law." Judge Will concluded that whatever adverse effect might be argued to flow from the practices here is "far outweighed" by the increased ability of Topco members to compete to the ultimate benefit of the consuming public (Opinion, A. 553).

is no restriction on the subsequent use or disposition of Topco-branded products which the Court found offensive in *Schwinn.*

In *Schwinn*, the Court held that the "Schwinn type" or "agency" distribution did not constitute a per se violation. These practices were found reasonable considering the availability of competitive products, sale of other brands by the retailers, reasonable relation of the program to competitive pressures and a net benefit to competition. Mr. Justice Fortas emphasized that the effect on competition must be examined for the product market as a whole: "Application of the rule of reason here cannot be confined to intrabrand competition." 388 U. S. at 381-382.

The opinion in *Schwinn*, therefore, does not support the conclusion urged by the government, particularly in light of the Court's observation that restrictions "may be permissible in an appropriate and impelling competitive setting." 388 U. S. at 379. The district court quite obviously was compelled by the competitive setting of this case to uphold Topco licensing as being in the interest of the consumer (Opinion, A. 553). *See, Albrecht* v. *Herald Co.*, 390 U. S. 145, 155 (1968) *rehearing denied*, 390 U. S. 1018 (1968) (concurring opinion); *Tripoli Company* v. *Wella Corp.*, 425 F. 2d 932 (3d Cir. 1970), *cert. denied*, 400 U. S. 831 (1970); *Janel Sales Corp.* v. *Lanvin Parfums, Inc.*, 396 F. 2d 398 (2d Cir. 1968), *cert. denied*, 393 U. S. 938 (1968); *cf., Mississippi Valley Gas Co.* v. *FPC*, 398 F. 2d 395, 398 (5th Cir. 1968).

B. Topco Does Not Possess Monopoly Power to Impair Competition in the Relevant Market.

The doctrine of ancillary restraints is applicable only where the parties do not possess monopoly power. Clearly,

the Topco members do not remotely approach monopoly power to control the level of price or restrict output.[43]

Topco members, whether considered individually or collectively, represent a very small fraction of the industry; Topco-branded products represent about .24% of total retail food store sales. Topco member market shares in their respective marketing areas range from 1.4% to 16.3%; their average share of the markets in which they operate is 5.87%, and their overall share of the industry is a mere 3.1%—hardly monopoly power. (D. 12, A. 556; Opinion A. 552; Pretrial Stipulation, A. 14, 21.)

Neither do Topco brands represent any significant share of the relevant product lines. Topco brands, like all other private label products, find their competition in generic product categories rather than within specific brands or even private brands generally. For example, Topco branded canned green beans compete with all other canned green beans regardless of the label (Barnes, A. 334-335). *United States* v. *Arnold, Schwinn & Co.*, 385 U. S. 365, 381-382 (1967); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377, 392-393 (1956). Within these generic categories there are vast numbers of labels competing with one another in all markets across the country. Different labels compete even in the same store (F. 27, A. 561; DX 2, A. 498).

Within the relevant local geographic markets in which Topco members operate, market shares of Topco products range from .26% to 1.48%, with an overall share of .34%. (Appendix A attached). Thus, any hypothetical restriction on competition within Topco brands, even if assumed to exist in all markets, could only affect somewhere between

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43. As articulated by Professor Bork, "the aggregate market share of the parties does not make restriction of output a realistic threat." 75 YALE L. REV. at 474.

.26% and 1.48% of food sales.[44] Economist, Dr. Irston Barnes, testified that sacrifice of the pro-competitive value of Topco private labels for the speculative possibility of intra-brand competition in such a negligible fraction of commerce would be economic nonsense (A. 362):

> If you have got competition between, say two percent, and probably in most situations Topco brands would represent less than that proportion of the market, the idea that you could change the character of competition by introducing competition between the two percent, when you have got competition between the two percent and the 98 percent, taxes the credulity of the economist.

C. Topco Licensing Does Not Adversely Affect Competition.

Pursuant to its per se theory the goverment argues that there is no occasion for this court to consider the evidence of beneficial competitive effects as found by the district court (GB, pp. 16, 25, 34). While asking this Court to ignore Judge Will's findings that the challenged practices serve to benefit competition, the government nevertheless urges the Court to draw inferences of adverse effects. The whole record establishes, however, that no restraint on competition was proven and that none exists.[45]

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44. Any such hypothetical effect rests upon the coincidence of a series of theoretical and unfounded speculations that one member: (a) might desire to expand into another member's primary marketing area; (b) might be able geographically to serve such store locations; (c) might be capable of such expansion; (d) might want to market Topco private labels there. Upon thorough consideration of all the evidence, Judge Will found no instance of actual restraint. (Opinion, A. 553).

45. The burden of proof in establishing that a particular arrangement is an unlawful restraint of trade rests upon the plaintiff. *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365, 374 n. 5 (1967). This burden requires more than showing some practice which suggests a "theoretical probability" of restraint. Sherman

For example, the government contends that Topco licenses somehow insulate Topco members from the rigors of direct price competition (GB, pp. 28-30). In reality, price competition is extremely keen at all levels, profit margins are narrow, and private label products are an important source of price competition rather than a barrier to it. (F. 21, A. 559; Applebaum, A. 164; Barnes, A. 339).[46]

Price competition is vigorous and pervasive between all brands, national and private, even in the same store, because with low priced, recurrently purchased products, the consumer readily buys, samples and compares competing products. Even after she selects the product which affords the best value in terms of quality and price, the consumer is continually informed of comparative prices in the regular newspaper, radio and television advertising of local food markets. The retail food merchant is never relieved of the pressure of price specials by which rivals seek to lure his customers. His private label is no protection from omni-

Act violations, absent specific intent, must be made out upon the realization of restraint, not mere speculation or conjecture. *United States* v. *Container Corp. of America*, 393 U. S. 333 (1968) (concurring opinion); *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948); *United States* v. *International Harvester Co.*, 274 U. S. 693, 708 (1927); *United States* v. *United States Steel Corp.*, 251 U. S. 417, 444 (1920). The government failed to sustain this burden.

46. The National Commission on Food Marketing noted that private brands were priced an average of 20% below comparable quality advertised brands and observed that they represent "a continuing example of price competition involving many items. For these private-label items, the competitive policy is still 'Buy for less, distribute cheaper, and discount at retail.'" (DX 1, p. 175; A. 495.)

The existence of a private label is often an important element in the "package" of goods and services which will serve to distinguish one store from another. Thus, depriving a retailer of the privacy of his label will not result in lower prices, but will destroy a means of waging price competition. The retailer will become a less effective competitor and search for another private label or other means of distinguishing his stores. This will in the long run tend to increase the cost of food distribution rather than decrease prices (F. 28, A. 561; Barnes, A. 351-353.)

present price competition. (Applebaum, A. 163, 204; Cooke, A. 234). See Comment, *Trade Regulation—Exclusive Territory-Justification-Private Label Grocery Products-United States* v. *Topco Associates,* 12 B. C. IND. & COM. L. REV., 1240, 1252-1254 (1971). Rather than permitting members to control prices, Topco serves to provide new price competition to the private brands exclusively controlled by the larger, pace-setting chains. The evidence, and logic as well, fully support Judge Will's finding that Topco licensing provisions "do not control or affect prices" (F. 46, A. 565).

The government has further contended that Topco licensing procedures inhibit member expansion. This contention is equally erroneous. The district court specifically found that each member exercises "independent discretion as to the location and number of stores it will operate" and that the Topco licensing system "does not have an appreciable influence on the decision of Topco members as to whether or not to expand, or on the rate of their expansion . . ." (F. 3, 45, A. 554, 564-565). These findings are also fully supported by the record. The inferences now offered by the government are contradicted by the evidence and were rejected by the trial court.

The government points out that 51 of approximately 1,000 member stores, are not licensed to carry Topco brands and asks the Court to infer that the licensing system must be a deterrent to expansion (GB, pp. 8, 31). In fact, precisely the opposite inference is compelled by the evidence; that is, when Topco members desire to expand, they encounter no difficulty in obtaining a license and they also expand without licenses. Topco members because of their size and financial limitations are generally able to grow with only one or two stores at a time. But when they do expand, licenses are generally granted as a matter of course for those areas where they intend to market Topco-branded products. Even where another is exclusively licensed, Topco's Board of Directors has authority under

the by-laws to change the license unless a member's primary marketing area is involved. (F. 44, A. 564; GX 5, A. 396-397; Fenn, A. 64-65, 78-79, 115-116.)

Without exception, the testimony establishes that the licenses have not controlled the selection of geographic areas into which Topco members have expanded nor influenced their rate of growth, except perhaps to accelerate it. While the availability of Topco labels might sometimes be a factor in the decision of where to expand, it is not a factor which would control such decision. (DX. 24, A. 536; Davis, A. 263; Newman, A. 284; Barnes, A. 360-361; 363-365; Cooke, A. 239-240; Meijer, 299.)[47]

Indeed, there are many instances where Topco members have expanded into new territories without Topco-branded products, including areas already exclusively licensed to another Topco member (Pretrial Stipulation, ¶ 22, R. 43; Fenn, A. 66-67, Tr. 247, 545; Newman, A. 278-282). Furthermore, Topco's general manager testified that he knew of no instance where a member failed to construct a store because he did not obtain a Topco license (Fenn, A. 67, 115-116; F. 45, A. 564-565). The record is completely devoid of any instances where Topco licensing has inhibited expansion. In the 25 year history of Topco the government has been unable to designate a single instance in which Topco licensing resulted in failure to expand, and so admitted during the course of trial (A. 209-210).

47. The decision of where to expand depends upon a broad range of complex factors, including warehouse locations, size of trading areas, population, availability of sites, arteries of traffic, competition, buying habits of consumers, economic structure and trends in the area, and an analysis of whether the need to meet new competition will conform to the marketing philosophy presently followed. (Applebaum, A. 174-175; Cooke, A. 240; Meijer, A. 299-300.) Dr. Barnes cogently expressed the significance of the availability of Topco labels in expansion (A. 363):

> It would be in the total equation. This would presumably carry a minus sign rather than a plus sign, but I think that the quantity behind the minus sign would never be large enough to change the decision whether that was a minus sign or a plus sign.

A further inference is offered by the government in an attempt to support its theory of adverse competitive effect. It is suggested that since it is impractical for an operator to stock dual lines of private labels in the same warehouse it will generally be impractical for a Topco member to expand with other private brands. Again, the government's inference is contradicted by the facts.

There are two basic areas of possible expansion by Topco members, and they involve essentially different considerations. First, expansion within range of an existing warehouse involves an obvious desire to take Topco brands into the new area because warehousing space is already devoted to stocking such products.[48] This involves no problem, unless one member's warehouse should be within range of another member's primary marketing area, but in view of the geographic dispersion of Topco members this would not likely occur. If such a circumstance would ever exist, however, expansion would not be prevented, for as the author of the document relied upon by the government testified, locally obtained packers', wholesalers' or other controlled labels would merely be substituted in those areas. Warehousing in such instances is provided by the supplier. (GX 102, A. 438; F. 42, A. 563-564; Meijer, A. 300; Fenn, A. 115-116; Applebaum, A. 191; Newman, A. 282-283.)

Second, in areas beyond the range of existing warehouses there are no storage efficiencies to be gained by using Topco brands. It is necessary to introduce a new private label into the market anyway, whether it be Topco or another private brand (Barnes, A. 361). In fact, in some cases another private label may actually be more desirable

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48. The economically feasible scope of such expansion also varies depending upon a number of factors, including, among others, traffic arteries, superhighways, and population patterns (Applebaum, A. 174; Meijer, A. 299; Cooke, A. 240). One member testified that the economically effective range from his warehouse was 90 to 100 miles (Dickelman, A. 322).

than Topco labels due to the logistics involved (Newman, Tr. 280-284). Furthermore, as conceded by the government, this type of expansion, known as "leapfrogging," is usually accomplished in leased food departments of general merchandise discount stores. In such outlets marketing strategies do not generally rely upon private labels (GB, p. 31; Newman, A. 278-280; Applebaum, A. 182). What is important is that even when a member operates under this marketing approach, he is not affected in his expansion. Thus, one Topco member alone expanded to compete with four other Topco members (Newman, A. 284).

The government's notion that the otherwise progressive Topco members would subject their organizations to practices preventing their normal growth and expansion is borne out neither by logic nor the evidence. The members of the Topco Board recognized this when they stated in 1959 that "expansion plans of the member companies cannot, practically speaking, be determined or seriously influenced by Topco territories" (DX 24, A. 536).

III. THE RELIEF SOUGHT BY THE GOVERNMENT WOULD INJURE COMPETITION.

The government argues that the relief sought by it would not cause Topco members to leave the organization because "[t]he alternative to a nonexclusive system of private labels is thus likely to be no private brands at all" (GB, p. 37). By this statement the government seems to concede that the net effect of acceptance of its position is the destruction of any system of cooperative procurement of private labels. What the government fails to comprehend is that *to* compel a grocer to share his private labels *also* means that he will have no private brands at all (Applebaum, A. 186; Barnes, A. 360).[49] As the district

49. The government cites a number of examples wherein it claims that two Topco members have sold Topco brands in the

court found, the ultimate effect would be to discourage applicants and dissipate existing membership (F. 35, A. 562).

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same area to the disadvantage of neither (GB, pp. 36-37). These examples, if anything, demonstrate that the Topco licensing provisions do not restrict the members from retailing or wholesaling wherever they please. They certainly do not support the intended inferences, as a more careful examination of the record demonstrates:

(1) In the case of Schultz Sav-O Stores, the record reveals that Schultz has the exclusive Piggly-Wiggly franchise for a 16 county area of Wisconsin and services stores which operate under that name. These stores, though separately owned, constitute a voluntary group presenting a single competitive image to the public. In these areas Topco brands are the private label of Schultz on the wholesale level and of Piggly-Wiggly at the retail level. (Dickelman, A. 323-325, 327.) A similar situation exists in Spokane where Fred Meyer operates IGA stores at retail (Fenn, Tr. 565-566, 600-603).

(2) The government points out that two members, A. W. Cullum and Allied, had licenses to wholesale Topco brands in the same areas in which they operated stores. There is, however, no evidence that either of those members sold Topco brands to stores in competition with their own retail stores. In fact, the evidence is to the contrary (Fenn, A. 118-119, Tr. 567).

(3) Baltimore was not the primary market for either Giant or Penn Fruit and thus Penn Fruit's relinquishment of its exclusive license there does not establish the lack of need in a member's marketing heartland (GX 52, A. 412; A. 179, 241). In 1966 Giant withdrew from Topco and established its own private label (DX 9; DX 15, A. 516, 521; A. 239, 250). Nor does the fact that Penn Fruit operates stores in Philadelphia under different names establish the lack of need for private labels. Such stores will naturally be geographically dispersed rather than located to compete. In any event the common ownership is generally known (A. 246).

(4) The example of Plum's and Meijer's is certainly no evidence that private labels are not necessary. Quite the contrary, the testimony establishes that when Meijer was faced with the possibility of a direct competitor possessing his private label in a primary territory he desperately searched for an alternative, even if it meant giving up his Topco brands (Meijer, A. 297; DX 27, A. 537; GX 50, A. 409; GX 102, A. 439; F. 43, A. 564).

(5) Finally, the suggestion in Topco's New Member Development program (GX 99) of the possibility of obtaining small members in a large metropolitan area does not mean that such firms would compete in larger metropolitan areas often contain distinct supermarket trading areas, as has been the case, for example, in the Boston region. (Fenn, A. 80, 92, 99-100; Davis, A. 261.)

A potential Topco member searching for a private label would recognize that it would not be available through Topco (Fenn, A. 72; Loeb, A. 317-318). The uncontradicted record demonstrates and the court found that present Topco members would not have joined and prospective members will not be attracted to the cooperative without the assurance of a private label (F. 35, A. 562; A. 317-318).[50]

The testimony further demonstrates that the existing Topco membership would immediately begin to seek alternatives. Those members which have progressed the furthest in their growth, and thus nearest to graduation from Topco, would be best equipped to begin development of their own limited exclusive programs. As larger members pulled away, Topco would find itself financially strained and the functions of Topco would lose efficiency. Eventually, even the smallest members would recognize that the services of Topco, without exclusivity, were becoming less advantageous and that an alternative means of distinguishing their stores should be sought. Some might be able to find a substitute; some might not. (Newman, A. 286; Meijer, A. 297; Loeb, A. 318-319; Opinion A. 553.)[51]

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50. Fenn, A. 54-56, 72-74, 215, 224; Applebaum, A. 163, 167-70, 172, 176-77, 184, 186, 195-96, 199, 206-207; Cooke, A. 235, 241-45; Davis, A. 258-59, 362-63; Newman, A. 277-78, 286, Tr. 797; Loeb, A. 311, 317-18; Barnes, A. 346-52, 362; DX 1, A. 485-486; 492; DX 1, 169, 174, 269, 276; DX 2, A. 498; DX 21, A. 526-32; DX 23, A. 534-35.

51. This phenomenon was perhaps best summarized in the expert opinion of the independent economist, Dr. Barnes, who described the licensing system as the "cement" which holds Topco together (A. 359-360):

> Without the exclusive use of the private label in its own territory, very few new members of any size would choose to join the Topco organization, and I think without it the graduation process would be accelerated. That is, there would be a tendency for the larger members to weigh the risk that they would lose their property rights in the private label, the

As the cooperative weakened, its members would become less effective as competitive factors in the retail food industry which could result in additional concentration (Davis, A. 262-263). The result would be a lessening of competition and a disservice to the consumer. Such consequences, of course, are precisely the evils which the antitrust laws were designed to prevent.

Many licensing programs among smaller businessmen, prevalent in the food distribution industry and in other industries as well, would be drastically affected by adoption of the per se rule here sought by the government. The competitive vigor in these industries, resulting in large measure from the cooperative response of small businesses, would be seriously impaired, thereby further entrenching already dominant corporations and contravening the national policy favoring protection of small business. *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 316, 346 (1962).[52]

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property rights which they have created in their own marketing area by their own promotion and by their own sustained efforts over the years.

. . . So that I think that without this opportunity to develop the private label as an effective competitive tool that Topco would suffer an attrition of membership. It woud have difficulty in attracting new members, and as it operated on a smaller base, I think it would find its cost increasing. It would not be able to do the job it is presently doing. It would probably have to cut back on its field forces, and it wouldn't be then in a position to keep its members cost competitive with respect to cooperative procurement.

52. *See*, DX 1, A. 464, 472-473; DX 3, 214-215, 315-320; DX 4, 214; Hampe & Wittenberg, *The Lifeline of America*, 299, 306-307 (1964); Galbraith, *American Capitalism* 141. These considerations undoubtedly led the Court to remark that the decision in *Sealy* does not require condemnation of the "quite different" situation involving cooperative efforts in the grocery industry which enhance competition, 388 U. S. at 357.

The district court recognized these facts and concluded (Opinion, A. 553):

> [T]he relief which the government here seeks would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket field. The antitrust laws were certainly not intended to accomplish such a result. Only the national chains and the other supermarkets who compete with Topco members would be benefitted. The consuming public obviously would not.

CONCLUSION.

For these reasons judgment of the district court should be affirmed.

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APPENDIX A.

The following table reflects market shares of Topco-branded products in licensed areas for 1963 (the last year for which such data is available by member).* For that year, sales of Topco products represented about .34% of retail food sales in all geographic areas where Topco members were licensed and about .20% of total U. S. food sales. In 1967 sale of Topco products represented about .24% of total U. S. food sales. (F. 10, A. 556; Pretrial Stipulation, A. 14, 22.) Topco members operated about .44% of all U. S. food stores in 1967. (Pretrial Stipulation ¶ 2, 22, A. 14, R. 43.)

* Market shares are computed with information contained in GX 104, pp. 7, 8, 38 (purchases of Topco brands), GX 106, p. 4 (retail food sales in licensed territories) and testimony (Fenn, A. 59).

Member	Percentage Share of Retail Food Sales Represented by Topco Brands in Licensed Territory
American Community	.83%
A. J. Bayless	.76
Big Bear	.96
Brockton	.26
A. W. Cullum	.49
Eagle	.34
Furr's	.76
Giant Eagle	.27
Liberal	.60
Meijer	.78
Fred Meyer	.30
Milgram	.74
Penn Fruit	.35
Pick-N-Pay	.69
Schultz	.39
Star (Cambridge)	.33
Star (Rochester)	1.48
Weingarten	.73

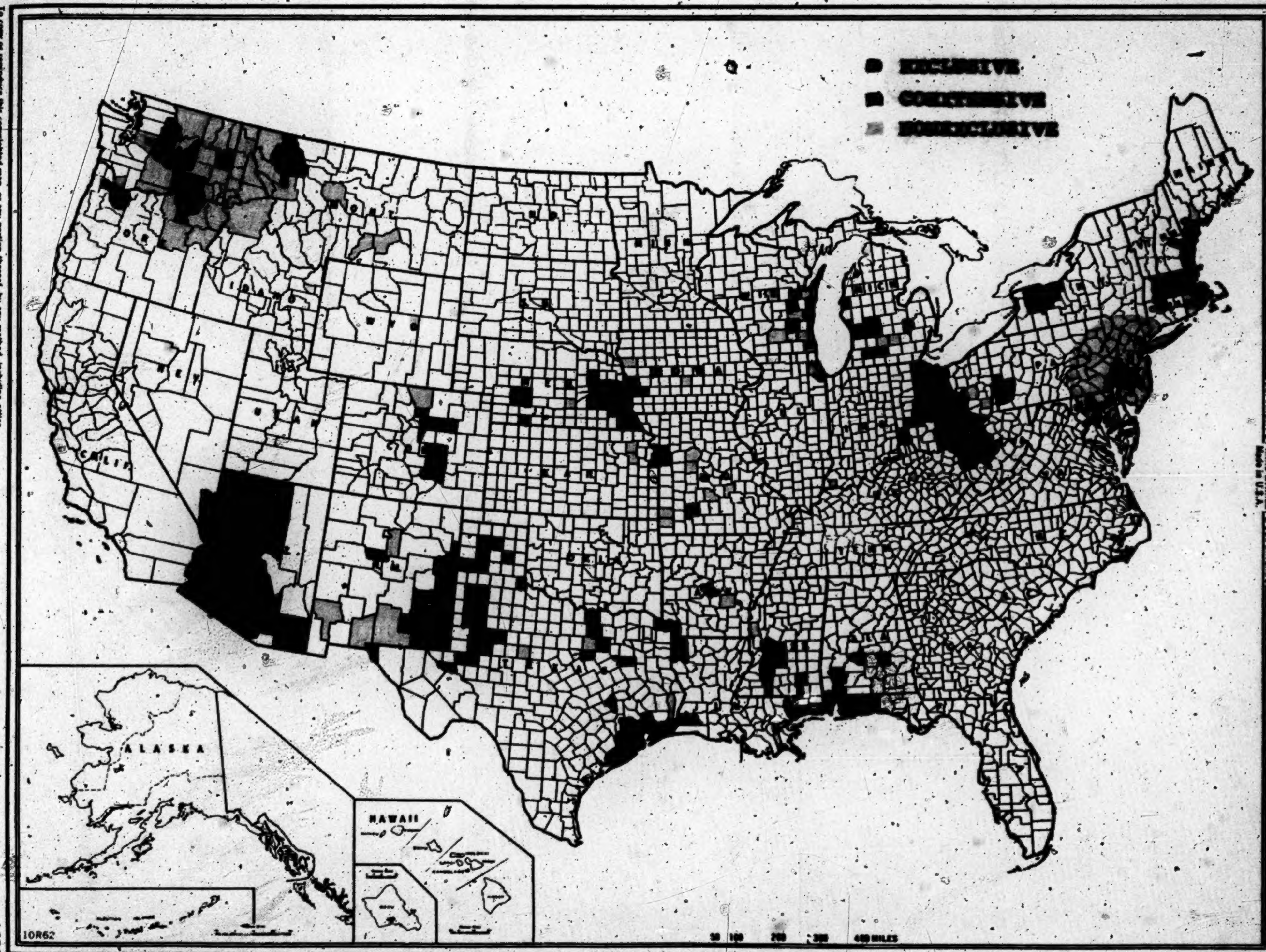
APPENDIX B.

The attached map reflects the areas licensed to those firms which were members of Topco at the time of trial (GX 45). The colors correspond to the types of licenses as follows:

Exclusive—green

Coextensive—brown

Nonexclusive—yellow



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